IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 4TH OCTOBER 2007 / 12TH ASWINA 1929

CRP.No. 687 of 2007

AGAINST THE ORDER DATED 26/6/07 IN IA 60/2007 IN OS.139/2007 of SUB COURT, PERUMBAVOOR

.....

REVN. PETITIONER: PETITIONER/2ND DEFENDANT

M/S LARSEN & TOUBRO LTD., E.C.C.,
DIVISION 19, KUMARA KRIPA ROAD,
BANGALORE-01.

BY ADV. SRI.P.R.VENKETESH
SRI.S.ANANTHAKRISHNAN

RESPONDENTS: RESPONDENTS/PLAINTIFF & 1ST DEFENDANT

----

1. G.K.GRANITES, OORAKKAD,
KIZHAKKAMBALAM P.O.,PIN-683562

2. FEDERAL BANK LTD.,
KIZHAKKAMBALAM BR.,
KIZHAKKAMBALAM P.O.

BY ADV. SRI.N.P.SAMUEL -- R2
SRI.JOSE ABRAHAM -- R1
SRI.ANIL THOMAS (MELEMALAYIL)
SRI.P.T.JINS

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 04/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON IA NO. 1824/2007 IN C.R.P. NO. 687/2007

DISMISSED

04/10/2007. SD/- M.N.KRISHNAN ,JUDGE.

True copy

tga

M.N.KRISHNAN, J

==========

C.R.P. No.687 OF 2007

==========

Dated this the 4th day of October 2007

ORDER

This revision is preferred against the order of the Sub Court, Perumbavoor in I.A.No.60 of 2007 in O.S.No.139 of 2007. It is an application filed by the second defendant in the suit under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the matter to the Arbitrator contending that the civil court has no jurisdiction to decide the issue. The suit O.S.No.139/2007 is filed by G.K.Granites against the second defendant M/s.Larsen & Toubro Ltd. The main prayer in the suit is for a declaration that the petitioner by invoking the bank guarantee executed by the 1st respondent perpetrated fraud on the plaintiff and also claiming damages against the 2nd respondent alleging that the 2nd respondent has in violation of the order of injunction released the bank guarantee for an amount of Rs.57 lakhs and thus caused huge loss to the 1st respondent. There are ancillary prayers also. So the subject matter of the suit is with respect to violation of an order of the court wherein it is alleged that on account of the violation of the court's order, the plaintiff has sustained

damages and that the Federal Bank, viz., the first defendant is also liable to pay damages of Rs.57 lakhs. The contention of the 2nd defendant, viz., M/s. Larsen and Toubro Ltd. is to the effect that the parties are governed by an arbitration clause and therefore the suit is hit by the provisions of the said Act. For the purpose of analysing the matters, it is relevant to extract the particular clause relied on by the 2nd defendant. It is submitted that clause 18.0 of the agreement is admittedly entered into between the parties. It is stated therein that "all disputes of difference of opinions, on account of the interpretation of clauses, technical specifications, etc. shall be resolved through direct and mutual discussions at the site level. In the case of difference of opinion still persisting, then the decision of the Regional Manager shall be final and binding on both the parties". Whether clause 18 can be interpreted as an arbitration agreement entered into between the parties to settle all the disputes arising between them is the question to be considered. A bare reading of that clause to my mind does not give such a wide meaning for the reason that when it is a works contract to be executed on the spot under the second defendant, so many things may have to be done at a rapid speed without wasting time so as to complete the project in time. It appears the agreement provides a stipulation that such differences which arise at the site level has to be mutually discussed between the

parties first and thereafter in case of difference the Regional Manager will interfere and his decision shall be binding on the parties. So what is contemplated therein does not cover a larger area of disputes arising after completion of the contract between the parties. Normally and especially when a very big company like M/s.Larsen and Toubro Ltd. enters into an agreement one will expect that there will be a specific arbitration clause whereby the parties will be pinned down to the relevant clause of the agreement for the purpose of resolving the dispute between them in the form of an arbitration clause. I am conscious of the fact that the absence of word 'arbitration' does not lead to the conclusion that there is no arbitration clause at all. Learned counsel for the petitioner had drawn my attention to the decision of the Apex Court reported in ***Rukmanibal v. Collector, Jabalpur (AIR 1981 SC 479)***. The Apex Court held that no particular form is to be prescribed and it is the intention of the parties to refer the dispute to the arbitration that is necessary to refer the matter so. In that particular case, learned counsel read out the clause which reads as follows:"Whenever any doubt, difference or dispute shall hereafter arise touching the construction of these presents or anything herein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable

hereunder the matter in difference shall be decided by the lessor whose decision shall be final". It was the said clause which the Apex Court interpreted and held that though the word 'arbitration' is not available there it amounts to an arbitration agreement and therefore it is to be referred to an Arbitrator. Learned counsel had also drawn my attention to the decision of the Apex Court reported in ***P.Anand Gajapathi Raju v. P.V.G.Raju(AIR 2000 SC 1886).*** The Apex Court in paragraph 5 held that 4 conditions have to be satisfied under sub sections(1) and (2) of Section 8 before the Court can exercise its power to refer parties to arbitration are:(1)there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the action is same as the subject matter of the arbitration agreement; (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute".

2. Learned counsel would contend that the suit and the revocation of guarantee, etc. all had arisen on account of the dispute between the parties and he relies on clause 18 to contend for the position that it becomes an arbitrable one and therefore in view of the wide powers conferred under Section 16 of the Arbitration Act, the matter has to be referred to the Arbitrator.

3. On the other hand, learned counsel for the first respondent in the revision petition would submit that a plain reading of clause 18 would only show that it is only an arrangement made between the parties with reference to difference of opinion that may arise at the site level for which an ultimate power is given to the Regional Manager and it never amounts to an arbitration clause. He had also invited my attention to the decision of the Supreme Court reported in ***Sukanya Holdings (P)Ltd. v. Jayesh H.Pandya and another (2003(5) SCC 531)*** and would contend for the position that when the subject matter of the suit takes in a person who is not a party to the agreement at all then the court cannot refer the matter to the Arbitrator. He had also relied on various passages, especially paragraph 13 of the judgment which reads as follows:"Secondly there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators. He would also invite my attention to the specific word used in Section 18 in a matter which is the subject matter of an arbitration agreement. Learned counsel had also relied on the decision reported in ***State of U.P. v. Tipper Chand(AIR 1989 SC 1522)*** as well as the decision of the Apex Court in ***Nav Bharat***

Construction Co. v. State of Rajasthan and others((1996) 7 SCC 89) contending for the position that the terms of the clause 18 are not amounting to an arbitration agreement. He had also taken me through the relevant clause of agreement which was the subject matter of the decision of the Apex Court in AIR 1980 SC1522 which reads as follows:

> "Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions hereinbefore mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment of the contract by the contractor, shall also be final, conclusive and binding on the contractor".

So, it is in this background and the position one has to analyse the matter now. At the outset, I may like to point out that here is a case where a relief is sought against the Federal Bank as well. The Federal Bank is not a party to the agreement. The main cause of action arises on account of the allegation that there is a breach of the order of the court that has resulted in revocation of guarantee which has resulted in

sustainment of loss to the tune of Rs.57 lakhs to the plaintiff in the case. The Federal Bank cannot be directed to appear before the Arbitrator to answer the charges levelled against it. Secondly, as discussed by me in the opening paragraphs, I feel that clause 18 does not actually show the nature of resolution of a dispute through an arbitration when there is real dispute between the parties. According to me, it only deals with a situation regarding certain difference of opinion that may arise at a site level which cannot be indefinitely postponed become a subject matter of decision by the Regional Manager. If the real intention was to refer every dispute then it is certain that the alleged arbitration clause 18 should not have specifically mentioned about one or two instances.

4. Therefore I am in agreement with the learned trial Judge that clause 18 does not envisage a situation of arbitrable clause. I also agree with the learned Munsiff that since the dispute between the party is something not only connected with the transaction but also concerned with the orders of the court and there is an allegation that whether fraud had been purported by somebody. These are all matters which requires consideration at the hands of a Civil Court. The Apex Court had made it clear that when a matter regarding arbitration is surrounded by fraud, that clause cannot be referred to an Arbitrator, then the civil court has to

decide that matter in such a situation.

5. Now as far as the main relief in the suit is concerned, the question of invoking the bank guarantee whether anybody has played fraud and whether there has been any mistake committed by the Federal Bank are the principal issues that have to be decided in the case.

I hold that there is nothing to interfere with the order passed by the learned Munsiff and there is no illegality, perversity or any irregularity committed by him in passing the impugned order. Therefore C.R.P. is dismissed.

M.N.KRISHNAN, JUDGE

Cdp/-